IN THE COURT OF APPEALS OF IOWA

No. 9-345 / 08-1620
Filed September 17, 2009

STATE OF IOWA,
Plaintiff-Appellee,

vs.

SHANNON WAYNE GEAR,
Defendant-Appellant.

Appeal from the Iowa District Court for Poweshiek County, Michael R. Stewart, District Associate Judge.

Appeal from the denial of a motion to dismiss, claiming the Iowa Code section 123.46(2) is unconstitutional. **AFFIRMED**.

Dennis McKelvie and Denise McKelvie Gonyea of McKelvie Law Office, Grinnell, for appellant.

Thomas J. Miller, Attorney General, Christen Douglass, Assistant Attorney General, Michael W. Mahaffey, County Attorney, Rebecca Petig, Assistant County Attorney, and Scott Wadding, student intern, for appellee.

Heard by Sackett, C.J., and Vogel, J., and Miller, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2009).

PER CURIAM

Shannon Gear appeals from the district court's denial of his motion to dismiss the charge of public intoxication against him, claiming the underlying statute, Iowa Code section 123.46(2) (2007) is unconstitutional. We affirm.

I. Background.

Gear staggered into a convenience store about 2:20 a.m. one morning with slurred speech and reeking of alcohol. He repeatedly tried, but was unable to operate the telephone. A police officer, who had seen Gear enter the store, spoke with Gear. The officer observed that Gear smelled strongly of alcohol, had bloodshot, watery eyes, had poor balance, and had slurred speech. Gear admitted he was intoxicated and knew it was illegal, but refused to submit to sobriety testing. The officer arrested Gear.

The State charged Gear with public intoxication, second offense, in violation of Iowa Code sections 123.46(2) and 123.91(1). Gear filed a pretrial motion to dismiss, claiming Iowa Code section 123.46(2) is unconstitutional. He alleged: (1) the statute is unconstitutional on its face, (2) it is overbroad and violates the right of free speech, (3) it is vague and violates procedural and substantive due process, and (4) it violates the prohibition against cruel and unusual punishment. The district court denied the motion to dismiss. In its ruling on the motion, the district court did not expressly rule on the constitutionality of the statute. Rather, the court stated, "It is not the place of a district associate judge to declare unconstitutional a statute that has withstood review before the Iowa Supreme Court for the last seventy-three years." The supreme court

denied Gear's subsequent application for discretionary review. Following a trial to the court on the minutes, Gear was convicted of public intoxication, second offense. The court later sentenced Gear to pay a fine of $315 plus court costs and a criminal penalty surcharge. Gear appeals.

II. Scope and Standards of Review.

Our review of a district court's ruling on a motion to dismiss is for correction of errors at law. *State v. Finders*, 743 N.W.2d 546, 548 (Iowa 2008). Our review of the constitutionality of a statute is de novo. *See State v. Wade*, 757 N.W.2d 618, 622 (Iowa 2008).

> [S]tatutes are cloaked with a presumption of constitutionality. The challenger bears a heavy burden, because it must prove the unconstitutionality beyond a reasonable doubt. Moreover, "the challenger must refute every reasonable basis upon which the statute could be found to be constitutional." Furthermore, if the statute is capable of being construed in more than one manner, one of which is constitutional, we must adopt that construction.

State v. Seering, 701 N.W.2d 655, 661 (Iowa 2005) (quoting *State v. Hernandez-Lopez*, 639 N.W.2d 226, 233 (Iowa 2002) (citations omitted)). "[W]e normally avoid constitutional claims when an appeal can be decided on other grounds." *State v. Kukowski*, 704 N.W.2d 690, 691 (Iowa 2005). "We have an obligation to preserve as much of a statute as possible within constitutional restraints." *Clark v. Miller*, 503 N.W.2d 422, 424 (Iowa 1993).

> If any provision of an Act or statute or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the Act or statute which can be given effect without the invalid provision or application, and to this end the provisions of the Act or statute are severable.

Iowa Code § 4.12; *see also Clark*, 503 N.W.2d at 424*; American Dog Owners Ass'n, Inc. v. City of Des Moines*, 469 N.W.2d 416, 418 (Iowa 1991).

III. Merits.

Because all of Gear's claims concern the language of Iowa Code section 123.46(2), we begin by setting forth the language of that subsection in its entirety:

> A person shall not use or consume alcoholic liquor, wine, or beer upon the public streets or highways. A person shall not use or consume alcoholic liquor in any public place except premises covered by a liquor control license. A person shall not possess or consume alcoholic liquors, wine, or beer on public school property or while attending a public or private school-related function. *A person shall not be intoxicated or simulate intoxication in a public place.* A person violating this subsection is guilty of a simple misdemeanor.

Iowa Code § 123.46(2) (emphasis added). This section is part of the "Iowa Alcoholic Beverage Control Act." *Id.* § 123.1. The legislature intended the statute to be an exercise of the State's police power "for the protection of the welfare, health, peace, morals, and safety" of the people of Iowa. *Id*. It is to "be liberally construed for the accomplishment of that purpose." *Id*.

Gear raises three constitutional challenges to the emphasized language quoted above. First, he contends the statute is overbroad on its face because it violates the constitutional right of free speech. Second, he contends the statute is void for vagueness because it violates constitutional due process. Third, he contends the statute violates the constitutional protection against cruel and unusual punishment. We address each contention in turn.

A. Overbreadth. Gear contends section 123.46(2) is unconstitutionally overbroad because the words "simulate intoxication" create "an inherent threat against freedom of speech and press." A statute is overbroad if "it attempts to achieve a governmental purpose to control or prevent activities constitutionally

subject to state regulation by means which sweep unnecessarily broadly and thereby invade the area of unprotected freedoms." *City of Maquoketa v. Russell*, 484 N.W.2d 179, 181 (Iowa 1992) (quoting *State v. Pilcher*, 242 N.W.2d 348, 353 (Iowa 1976)). An overbroad statute may be invalid on first amendment grounds even when a defendant's activity is not itself constitutionally protected. *See Board of Airport Comm'rs v. Jews for Jesus, Inc.*, 482 U.S. 569, 574, 107 S. Ct. 2568, 2571-72, 96 L. Ed. 2d 500, 507 (1987); *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 503, 105 S. Ct. 2794, 2801, 86 L. Ed. 2d 394, 405 (1985). However, "'the mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge.'" *State v. Todd*, 468 N.W.2d 462, 466 (Iowa 1991) (quoting *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 800, 104 S. Ct. 2118, 2126, 80 L. Ed. 2d 772, 783 (1984)).

The Supreme Court has held that, "particularly where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Broadrick v. Oklahoma*, 413 U.S. 601, 615, 93 S. Ct. 2908, 2917, 37 L. Ed. 2d 830, 842 (1973). Even if one of the alternative means of violating section 123.46(2), simulating intoxication, could be interpreted as restricting free speech as shown by actions, application of overbreadth principles would result only in partial invalidity of the statute. *See Clark v. Miller*, 503 N.W.2d at 424. Gear was convicted of actual intoxication in public. This falls within the statute's "plainly legitimate sweep." *Broadrick*, 413 U.S. at 615, 93

S. Ct. at 2917, 37 L. Ed. 2d at 842; *see also* Iowa Code § 123.1. We reject Gear's overbreadth argument. Accordingly, we conclude the district court did not err in denying Gear's motion to dismiss on this ground.

B. Vagueness. Gear contends the statute is facially void for vagueness. He argues, because the term "intoxication" is not defined, "an ordinary citizen is not able to judge as to when he or she is in violation of the law." The State contends Gear lacks standing to raise a facial challenge to section 123.46 for vagueness because, "[i]f a statute is constitutional as applied to the defendant, the defendant lacks standing to make a facial challenge unless a recognized exception applies." *State v. Hunter*, 550 N.W.2d 460, 463 (Iowa 1996). One recognized exception is where free speech rights are implicated. *State v. Price*, 237 N.W.2d 813, 816 (Iowa 1976). The Supreme Court has limited the application of this exception only to where a statute's deterrent effect on legitimate expression was "real and substantial." *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 60, 96 S. Ct. 2440, 2447, 49 L. Ed. 2d 310, 320 (1976).

Gear contends prohibiting *simulated* intoxication significantly infringes on the rights of freedom of speech. He offers some hypothetical examples of how the statute might be enforced so as to restrict free speech. In 1972 our supreme court noted that "this rather unique provision—which the State and the defendant agree has been found in the statutes of no other state—has been part of the quoted section since 1935." *State v. McGuire*, 200 N.W.2d 832, 833 (Iowa 1972). That was the first time in thirty-seven years that anyone had possibly

been subject to a restriction of free speech based on the term "simulate." In the thirty-seven years since *McGuire*, none of the five additional times the supreme court has reviewed the public intoxication statute indicate any restriction of the right of free speech. Given the lack of impact this language has had on free speech in nearly seventy-five years, we cannot say the deterrent effect of the statute is real and substantial. Consequently, we conclude the exception does not apply and Gear lacks standing to raise a facial challenge.

A statute may be unconstitutionally vague if it authorizes or encourages arbitrary and discriminatory enforcement. *Anspach*, 627 N.W.2d at 232. Gear argues the vagueness of the statute is "even more troubling [because] it provides no guidance for police officers to determine at what point a person is 'intoxicated.'" Although the statute does not reference an explicit, objectively measurable standard for "intoxication," such as the 0.08 blood alcohol concentration used in section 321J.2, describing operating a motor vehicle while intoxicated, we do not agree the language of section 123.46(2) that applies to Gear's case encourages arbitrary and discriminatory enforcement. We conclude the statute provides sufficient guidance to law enforcement personnel so that they can understand what conduct is prohibited and does not encourage arbitrary and discriminatory enforcement.

***C. Cruel and Unusual Punishment*.** Gear contends the penalty "is so excessively severe that it is disproportionate to the offense charged." In August of 2007 Gear was charged by trial information with "public intoxication, second offense," based on the events of June 25 and his prior conviction of public

intoxication in April of 2007. Public intoxication as defined in section 123.46 is a simple misdemeanor. Section 123.91 provides a person is guilty of a serious misdemeanor following a second conviction and an aggravated misdemeanor following a third or subsequent conviction. The maximum punishment for a serious misdemeanor is up to one year in prison and a fine of up to $1875 plus surcharges and costs. Gear argues "a year in prison for a crime that is neither violent nor contains elements of moral turpitude is unconscionable."

We begin by noting that the district court did not impose any prison or jail time in this case and fined Gear about one-sixth of the maximum fine, plus surcharges and costs, including the fees of his court-appointed attorney. The court allowed Gear the alternative of working off his fine, surcharge, and costs by performing community service.

"The Eighth Amendment prohibits sentences that are disproportionate to the crime committed." *State v. Musser*, 721 N.W.2d 734, 748 (Iowa 2006) (citing *Solem v. Helm*, 463 U.S. 277, 284, 103 S. Ct. 3001, 3006, 77 L. Ed 2d 637, 645 (1983)). The legislature is afforded great latitude in setting the penalty for crimes; a sentence that falls within the "statutorily prescribed parameters" will rarely be found to be in violation of the Eighth Amendment. *State v. Wade*, 757 N.W.2d 618, 623 (Iowa 2008). "Only extreme sentences that are grossly disproportionate to the crime violate the Eighth Amendment." *Id.* When a defendant raises a disproportionality claim, we compare the severity of the penalty with the seriousness of the crime. *See State v. Lara*, 580 N.W.2d 783, 785 (Iowa 1998). "This analysis is undertaken objectively without considering the

individualized circumstances of the defendant". *Musser*, 721 N.W.2d at 748. We analyze further only when this comparison shows that the penalty's severity is grossly disproportionate to the seriousness of the crime. *Id.*

The purpose of section 123.46(2) is to "prevent nuisance and annoyance of the general public" and to serve as protection against offenders who endanger themselves and others. *Booth*, 670 N.W.2d at 213. In light of these legitimate state interests, a fine of $315.00, a criminal penalty surcharge, plus court costs is not grossly disproportionate to the crime of a second offense under section 123.46(2). The State has a strong interest in protecting its inhabitants against intoxicated persons who harass other citizens and do violence both to themselves and to others. *See* Iowa Code § 123.1. While Gear may not have been doing either of these when he was arrested, we make the disproportionality analysis objectively, without regard to any defendant's particular circumstances. *Musser*, 721 N.W.2d at 748. Gear summarily claims his sentence is disproportionate to his crime; he fails to meet the threshold of gross disproportionality. *Id*. We need not analyze his claim further. *See Solem*, 463 U.S. at 284, 103 S. Ct. at 3006, 77 L. Ed. 2d at 645. This claim fails.

AFFIRMED.

Vogel, J. and Miller, S.J. concur; Sackett, C.J. dissents in part.

SACKETT, C.J. (dissenting in part)

I dissent in part.

Shannon Wayne Gear, who was convicted of a violation of Iowa Code section 123.46(2),[1] contends the statute is unconstitutional. The focal question is whether the word "intoxication," used in the statute without definition, is vague. Gear contends it is and, as a consequence, the statute is unconstitutional in that it fails to provide explicit standards for those who enforce it. The State responds that the statute does not allow for arbitrary enforcement and "[t]he meaning of the word 'intoxication' in section 123.46(2) can be ascertained by reference to various sources."[2]

The majority, while recognizing that the statute does not reference an explicit, objectively measurable standard for "intoxication," summarily concluded that the statute provides sufficient guidance to law enforcement personnel so that they understand what conduct is prohibited and does not encourage arbitrary and discriminatory enforcement. They make this statement while admitting that this statute does not reference an explicit, objectively measurable for intoxication such as in section 321.J(2), defining operating a motor vehicle while intoxicated by a blood alcohol concentration of 0.08.[3]

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[1] Iowa Code section 123.46(2) provides:

> A person shall not be intoxicated or simulate intoxication in a public place.
> A person violating this subsection is guilty of a simple misdemeanor.

[2] I would suggest that the more sources there are to define a word the muddier its definition becomes.

[3] A person most probably would not be charged with violation of Iowa Code section 321.J(2) if the person had only had a glass of wine, but the majority's position that an objectively measureable level for ingestion of an intoxicant is not necessary would allow a conviction for public intoxication to be at a blood alcohol concentration of considerably

I agree with the State that an undefined word does not necessarily render a statute unconstitutional if the meaning of the word can be fairly ascertained by reference to similar statutes, the dictionary and the common law, or the generally accepted meaning of the word. I would concede that "intoxication" broadly defines the state of any person who has consumed an intoxicant. However, because "intoxication" is basically a stand-alone word without additional definition in section 123.46, it does not distinguish a person who has had a glass of wine from one who has had six cans of beer or a fifth of whiskey.[4] Nor does section 123.46 require any conduct in addition to having the glass of wine necessary for a finding of "intoxication" and incarcerating one against their will. The law requires more in a mental health setting.[5] A number of states have added "danger to self" or similar language to statues defining public intoxication.[6] Gear

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less than 0.08—a strained but possible result of which would be for a person who has ingested intoxicants to drive rather than walk or sleep on a park bench.

[4] The issue may not have come up before because I do believe that Iowa law enforcement officers are generally reasonable people. However the lack of a standard opens the door for a vindictive or unreasonable officer to act unreasonably.

[5] In *O'Connor v. Donaldson*, 422 U.S. 563, 575, 95 S. Ct. 2486, 2493, 45 L. Ed. 2d 396, 406-407 (1975), the Court said:

> A finding of "mental illness" alone cannot justify a state's locking a person up against his will and keeping him indefinitely in simple custodial confinement. Assuming that the term can be given a reasonably precise content and that the "mentally ill" can be identified with reasonable accuracy, there is still no constitutional basis for confining such persons involuntarily if they are dangerous to no one and can live safely in freedom.

[6] For example, a number of our sister states define public intoxication (providing in some cases for a criminal charge or others for a police officer placing the person in civil protective custody) as being under the influence of an intoxicant to the degree that he or she endangers himself or herself or others. *See* Ala. Code § 13A-11-10 (1975); Ariz. Rev. Stat. Ann. § 36-2026 (2009); Ark. Code Ann. § 5-71-212 (2006); Conn. Gen. Stat. § 17a-683 (2005); Ill. Comp. Stat. Ann § 25-15 (2008); Ky. Rev. Stat. Ann. § 525.100 (2009); Neb. Rev. Stat. § 53-1,121 (2009); Nev. Rev. Stat. § 458.270 (2007); 42 Pa.

would not have met that definition, for he was just trying to use a telephone to get a ride home.

Perhaps my position can best be illustrated by looking at two dictionary meanings. The first is the State's cite defining "intoxicate" from the *Webster's New Collegiate Dictionary* (1977) as "to excite or stupefy by alcohol or a drug [especially] to the point where physical or mental control is markedly[7] diminished." The second is a cite from *Webster's New Collegiate Dictionary* 595 (3rd ed. 2005) that defines "intoxicate" as "[t]o bring about, [especially] by the effect of ingested alcohol, any of a series of progressively deteriorating states ranging from exhilaration[8] to stupefaction."[9] The first definition would demand at least some evidence of lack of physical or mental control and the second only silly laughter. How does the word intoxication give an officer an explicit, objectively measurable standard to enforce the statute?

The State also responds to Gear's claims that:

> The statute [123.46(2)] allows the state to regulate those who are intoxicated and posing a danger either to themselves or others. While section 123.46(2) is not designed to be enforced against those who drink responsibly.[10]

The trouble with the State's argument is that the statue does not use the words the State uses in its argument. If it did, I would find the statute

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Cons. Stat. § 8902 (2007) (citing to 18 Pa. Cons. Stat. § 5505 on public drunkenness); Tex. Stat. Ann. § 49.02 (2007).

[7] *Webster's New Collegiate Dictionary* 686 (3rd ed. 2005) defines "markedly" three ways. The definition most relevant here is "Clearly defined and evident: NOTICABLE."

[8] *Id.* 400 (defining "exhilarate" as to "make happy").

[9] No definition is found in *Webster's New Collegiate Dictionary* for this word.

[10] Also arguing without authority "that an intoxicated person's dangerous conduct does not deserve First Amendment protection."

constitutional, but it does not. Clearly someone who is harming others should be arrested. The defendant here was not. If the legislature wishes to continue to have public intoxication be a crime, the language the State uses above should be included in the statute. Our statute is unique among the fifty states, many of whom have decriminalized intoxication, facing the problem as a health problem to be handled by public health rather than criminal processes.[11]

The majority also has sought to address the words "simulated intoxication" in the statute and then found defendant did not have standing to raise the challenge. I agree that the defendant does not have standing to address his claim that it infringes on freedom of speech. The majority has dismissed his challenge, noting that in *State v. McGuire*, 200 N.W.2d 832, 833 (Iowa 1972), the court recognized it had been in the law since 1935, this was the first time it was claimed to be a restriction on free speech, and was it unique among the states.

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[11] For example the policy of the Tennessee legislature states:

> (a) It is the Policy of this state that intoxicated persons should be afforded a continuum of treatment so they might lead normal lives as productive members of society.
>
> (b) The general assembly recognizes that character and pervasiveness of alcohol abuse and alcoholism and that public intoxication and alcoholism are health problems that should be handled by public health rather than criminal procedures, when proper facilities, procedures, and services as defined and set forth in this part are available.
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> (c) The general assembly recognizes the character and pervasiveness of alcohol abuse and alcoholism and the public intoxication and alcoholism are health problems that should be handled by public health problems that should be handled by public health rather than criminal procedures, when problems that should be handled by public health rather than criminal procedures, when proper facilities, procedures, and services as defined and set forth in this part and available.
>
> (d) The general assembly find that the handling of intoxicated persons as criminals contributes to jail overcrowding and the consumption of resources needed for the handling of more serious and violent matters.

Tenn. Code Ann. § 68-24-503 (2009).

The majority then noted in the five times since *McGuire* that the Iowa Supreme Court has reviewed the public intoxication statute, it did not indicate any restrictions on free speech. The majority then concludes without citation that, "Given the lack of impact this language has had on free speech in nearly seventy-five years, we cannot say the deterrent effect of the statute is real and substantial." In *McGuire*, the court recognized that the defendant had raised the challenge but elected not to address it, dismissing on other grounds. *McGuire* fails to support the majority's conclusion on this issue.